UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARDS

NLRB Case No. 07-CD-182456

LOCAL 876 INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS (IBEW), AFL-CIO

Charged Party/Respondent

and

NEWKIRK ELECTRIC ASSOCIATES, INC.

Charging Party/Employer

and

LOCAL 324, INTERNATIONAL UNION OF
OPERATING ENGINEERS, AFL-CIO

Involved Party/Intervenor

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RESPONSE TO AMICUS CURIAE PLAN FOR THE SETTLEMENT OF JURISDICTIONAL DISPUTES IN THE CONSTRUCTION INDUSTRY

INTRODUCTION

Charged Party IBEW Local 876 hereby submits its Reply to the Amicus Curiae Plan for the Settlement of Jurisdictional Disputes in the Construction Industry ("Plan").[1] The Plan advances a position that is contrary to not only decades of Board precedent, but also basic legal principles that are accepted by all in the legal community as settled. First and foremost among these principles is the accepted truth that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648–49, 106 S. Ct. 1415, 1418, 89 L. Ed. 2d 648 (1986)(omitting citations). IBEW Local 876 does not now agree, and has never agreed, to submit jurisdictional disputes to the Plan for resolution. The Plan nonetheless would have this Board decline jurisdiction on the grounds that IBEW Local 876 should be compelled to have its collective bargaining agreement interpreted and its alleged conduct in the unfair labor practice case assessed by some distant arbitration tribunal that IBEW Local 876 never accepted and in accordance to the "Plan's" rules and procedures that IBEW Local 876 never agreed upon.

Not only does the Plan contend that the Board should overlook the complete lack of any evidentiary record binding IBEW Local 876 to the Plan, but the Plan argues that the Board should overturn established controlling authority addressing the very issue present in this case.

[1] IBEW incorporates and adopts by reference the arguments set forth in its post-hearing brief filed on November 10, 2016 and the portions of the Charging Party Newkirk Electric's post-hearing brief where Newkirk Electric similarly explains that there is no agreement by all parties to submit the jurisdictional dispute to private arbitration. See Newkirk's post- hearing brief at 16-20.

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Namely, the Board has repeatedly recognized "in several decisions over the years . . . the distinction between 'inside' and 'outside' locals of the IBEW and taken official note of the fact that the latter are not subject to the procedures for the resolution of jurisdictional disputes established by the Building and Construction Trades Department, AFL-CIO." *Elec. Workers, Local 44*, 233 NLRB 1099, 1100 (1977). The Board has reaffirmed this ruling recently in *Int'l Bhd. of Elec. Workers, Local 196 & Aldridge Elec., Inc. & Int'l Union of Operating Engineers, Local 150*, 358 NLRB 737, 741 (2012).[2]

Finally, Section 10(k) specifically vests with the Board the power to "hear and determine" jurisdictional disputes. The National Labor Relations Board "has had long experience in hearing and disposing of similar labor problems. With this experience and a knowledge of the standards generally used by arbitrators, unions, employers, joint boards and others in wrestling with this problem, ***we are confident that the Board need not disclaim the power given it for lack of standards. Experience and common sense will supply the grounds for the performance of this job which Congress has assigned the Board.***" *NLRB v. Radio & Television Broadcast Engineers Union, Local 1212,* 364 U.S. 573, 583 (1961)(emphasis added).

The settled case and Board law demands that the Plan's position be denied and that the Board hear and determine this jurisdictional dispute.

1. The Board possesses jurisdiction and there is no agreed-upon method for a voluntary adjustment in this case.

The Plan's argument fails because all of the parties to the underlying jurisdictional dispute did not voluntarily agree to the Plan's private arbitration procedure as a method of settlement.

[2] Finding that "The International Brotherhood of Electrical Workers did participate in the December 6 arbitral hearing, but Local 196 did not. Even if the arbitrator's decision establishes that the International is bound under the Plan, it does not necessarily follow that Local 196 was so bound. Local 196 Business Agent Eric Patrick testified, without contradiction, that only "inside" IBEW locals are bound under the Plan, that Local 196 is an "outside" local, and that Local 196 is not affiliated with the Building and Construction Trades Department. The record is devoid of documentary evidence tending to show otherwise." Id at n. 5.

The Plan correctly notes that the Board will decline jurisdiction in a 10(k) dispute where all the parties to the dispute have agreed to submit their disagreement to resolution through private arbitration procedures. Brief at 5-7. However, the Plan conveniently ignores the statutory 10(k) requirement that the Board, before declining jurisdiction, must first find "satisfactory evidence" that the parties have agreed to the *voluntary adjustment* of the dispute. "It is well settled that all parties to the dispute must be bound if an agreement is to constitute an agreed method of voluntary adjustment." *Laborers International Union of N.A. , Local Union 1184, (High Light Electric)* 355 NLRB 167, 169 (2010)(omitting citations); *International Brotherhood of Electrical Workers, Local 196 (Aldridge Electric),* 358 NLRB 737, (2012)(same). The finding that all parties must agree to the voluntary adjustment is dictated by statute:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, ***unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute.*** Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed. 29 U.S.C.A. § 160 (emphasis added).

The Plan's contention that "Congress intended to promote the private resolution of jurisdictional disputes" only tells part of the story. Plan Brf. at 6. Congress also made clear that private resolution of jurisdictional disputes is only appropriate where all parties have agreed to a private dispute mechanism. This is so because "Congress designed Section 10(k) not only to support the enforcement of private, voluntary agreements but also to protect employers and the public from the detrimental economic impact of jurisdictional strikes and picketing." *International Union of Operating Engineers v. NLRB,* 755 F.2d 78, 86 (7th Cir. 1985). The U.S. Supreme Court has explicitly recognized that "Congress, after discussion and consideration, decided to intrust this decision [hearing and determining jurisdictional disputes] to the Board. It has had long

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experience in hearing and disposing of similar labor problems. . . . the Board need not disclaim the power given it for lack of standards." *NLRB v. Radio & Television Broadcast Engineers Union, Local 1212,* 364 U.S. at 583. Protecting employers, the public and labor unions who have not agreed to be bound by a private dispute mechanism takes precedence in the 10(k) statutory scheme over blind adherence to the "promotion" of private dispute mechanisms.

The Board's application of this statutory pronouncement dictates that it must assert jurisdiction in the case at bar and render a decision on the merits. None of the cases cited in the Plan's brief authorize the Board to decline jurisdiction to determine the jurisdictional dispute faced by Newkirk Electric. In fact, the cases cited by the Plan merely reinforce the obligation of the Board in the instant matter to render a decision on the merits.

The case law the Plan cites in support of its position that an agreed-upon dispute resolution mechanism existed actually counsels in favor of reaching the *opposite* conclusion. For example, in the cases cited by the Plan, the Board deferred exercising jurisdiction as it made specific findings that all affected parties had voluntarily agreed upon a settlement procedure:

- "Both the Plumbers and the Sheet Metal Workers are members of the Building and Construction Trades Department, AFL-CIO (BCTD) and are therefore signatory to the agreement establishing the IJDB. As such, they are bound to abide by its rules and procedures for the settlement of jurisdictional disputes." *Plumbers, Local Union No. 447*, 224 NLRB 985, 986–87 (1976);

- "However, without deciding what result we would reach if there were evidence that any party has refused to comply with the award of the Joint Board, we regard the fact that all the parties had agreed to be bound by a determination of the dispute by the Joint Board as satisfactory evidence that at the time the charge was filed the parties had "agreed upon methods for the voluntary adjustment of the dispute" within the meaning of Section 10 (k)." *Carpenters Local 943 (Manhattan Constr. Co., Inc.),* 96 NLRB 1045, 1048–49 (1951);

- "Fentron [employer] has agreed that, in the event of an interunion jurisdictional dispute, it will be bound either by a Joint Board determination of the dispute or by a determination

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of the dispute reached by agreement of the International Unions involved by whatever procedures the latter may adopt." *Bricklayers, Local 7*, 199 NLRB 1256, 1258 (1972);

- "we note that all parties [employer and two local Teamsters unions] to the present proceeding are signatories to the Articles of Construction Agreement between Associated General Contractors of Illinois and the Illinois Conference of Teamsters and that the agreement is in evidence." *Teamsters, Local 627*, 195 NLRB 93, 94 (1972);

- "Actually, this involves a single question, for, as the Board has already held, a finding that the Lathers is bound necessitates a finding that its locals are equally bound, regardless of the presence or absence of separate express consent." *Lathers Local 2 (Acoustical Contractors Ass'n)*, 119 NLRB 1345, 1362 (1958). This finding was based upon a prior decision of the Board that relied upon a specific provision of the Lathres' International Constitution that reserved to itself decisional rights in jurisdictional matters. See, e.g., *Lathers Local 9 (A. W. Lee, Inc.),* 113 NLRB 947, 952 (1955)

Applying the legal principles of each of these cases to the record before the Board requires a finding that the Board exercise its jurisdiction and issue a decision on the merits.

Finally, the Plan's discussion of the "preference" for the voluntary settlement of jurisdictional disputes ignores the seminal precondition for applying such preference – that all the affected parties agree that the dispute should be submitted to private arbitration. Brief at 7-8. "Where there exists an agreed-upon method for settlement of jurisdictional disputes, the Board will decline section 10(k) jurisdiction. *See William E. Arnold Co. v. Carpenters Dist. Council of Jacksonville & Vicinity,* 417 U.S. 12, 18, 94 S.Ct. 2069, 40 L.Ed.2d 620 (1974). The Board has explained that it does so to further Congress's preference, as expressed through the NLRA, for voluntary resolution of labor disputes. *See id.* However, where no agreed-upon method exists, the Board will exercise jurisdiction pursuant to section 10(k) and resolve the work dispute itself. *See Local 150,* 316 NLRB at 361." *Sheet Metal Workers Int'l Ass'n Local Union No. 27, AFL-CIO v. E.P. Donnelly, Inc.*, 737 F.3d 879, 889 (3d Cir. 2013).

2. IBEW Local 876 is not bound to the "Plan."

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The record clearly demonstrates that IBEW Local 876 is not bound to the Plan. Despite the Plan's assertion to the contrary, there is no "clear contractual obligation" binding IBEW Local 876 to the Plan. Brief at 10. The party asserting that the Board lacks jurisdiction due to a voluntary resolution procedure bears the burden of producing ***satisfactory evidence*** that such a procedure has been voluntarily agreed to by all. "Section 10(k) further mandates that the party alleging the existence of this resolution produce satisfactory evidence of it ("the Board is empowered and directed to hear the dispute ... unless ... the parties to such dispute submit to the Board satisfactory evidence that they have adjusted ... the dispute.")" N.*L.R.B. v. Millwrights Local 1102, United Bhd. of Carpenters & Joiners of Am., AFL-CIO*, 779 F.2d 349, 351 (6th Cir. 1985). Moreover, "In order to determine if the parties are bound, the Board carefully scrutinizes the agreements at issue." *Laborers Int'l Union of N. Am., Local Union 1184*, 355 NLRB 167, 169 (2010).

The fact that there is no record evidentiary support that IBEW Local 876 is bound to the Plan is driven home by the Plan's own brief which devotes a single short paragraph in its 17 page submission where it purports (and fails) to cite "evidence" binding IBEW Local 876 to the Plan. Brief at 9-10. The "evidence" cited by the Plan consists of two lines of testimony from IBEW Local 876 business manager Chad Clark who confirms that IBEW Local 876 is affiliated with the International Brotherhood of Electrical Workers (Tr. 451:23-25); several lines of testimony from Operating Engineers' witness Graham (Tr. 239:5-11) who guesses which international unions might be members of the BCTD and the Building Trades' "Constitution." Int. Ex. 9 at 28. As to the International's ("IBEW") relationship to the Plan, the sole evidence cited by the Plan is Operating Engineers' witness Graham's reply to the question: "when you say it governs the International, which International are we talking about?" Graham replies: "as I said, it's the

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building trades, as far as I know, the operators, electricians, the laborers, carpenters, I think the sheet metal, and the ironworkers." Tr. 239. From this answer, the Board is to conclude that IBEW Local 876 is mandated to submit disputes over its work to a private third party dispute mechanism ruled by the Plan. The Plan clearly does not meet the burden of citing "satisfactory evidence" that would contractually bind IBEW Local 876 to its private dispute mechanism.

The Plan argues, unsuccessfully, that IBEW Local 876 is bound to the Plan because the International ("IBEW") is affiliated with the Building and Construction Trades Department (BCTD). Brief at 9. The Plan contends that IBEW Local 876, although not a party to the Plan, is "bound to the Plan by virtue of its affiliation with the International Brotherhood of Electrical Workers." Brief at 9. This argument quickly falls apart upon review of the facts.

First, in this case, there is no record evidence that the International Brotherhood of Electrical Workers is bound to the Plan. No official from the International testified, the International did not participate in the Plan's "arbitration" and the Plan document is not signed by the International. Intervenor Exhibits 9, 10, 19. Even if the Board were to overlook the Plan's failure to establish the nature of the International (IBEW)'s relationship to the Plan, the Plan's argument is fatally flawed due to the second reason discussed below. (However, the Plan should not overlook this primary failure as it is the party who alleges the existence of a private dispute mechanism that bears the burden of establishing satisfactory evidence).

Second, and perhaps most important, it is not disputed that IBEW Local 876 is not a party to the Plan. IBEW Local 876 is not a signatory to the Plan. Intervenor Exhibit 10; Tr. 451 (IBEW Local 876 business manager has never before even seen the "Plan"). The collective bargaining agreement between Newkirk Electric and IBEW Local 876 makes no mention of the "Plan" because IBEW Local 876 is not bound by the Plan. Employer Exhibit 4. IBEW Local

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876 is not a member of the BCTD. Tr. 451- 452. IBEW Local 876 business manager Clark testified, without contradiction, that IBEW Local 876 is an outside local and that outside locals are not subject to the "Plan." Tr. 450-453.

Third, the IBEW specifically agrees that its outside locals are not subject to the Plan. The IBEW Constitution defines IBEW Local 876 as an outside local; IBEW Local 876 was chartered as an outside local in 1938. Charged Party Exhibit 6 at 85; Tr. 425-426. The IBEW's "Business Managers Construction Jurisdiction Handbook" reaffirms that outside IBEW locals are not subject to the Plan by explicitly stating that:

> "***The outside branch of the IBEW does not participate in the plan for the settlement of jurisdictional disputes in the construction industry***, and work recognized by I.O. as coming under the outside branch will not be subject to the plan for the settlement of jurisdictional disputes in the construction industry procedures." Charged Party Exhibit 15 (emphasis added).

Pursuant to their constitution, outside IBEW locals are not subject to the Plan. Charged Party Exhibit 6. at 83-85. This finding is supported by controlling NLRB case law. The Plan does not account for the record evidence that refutes any claim that IBEW Local 876 is bound by the Plan.

Finally, even the plain terms of the Plan contradict the Plan's argument that a local is automatically bound "by virtue of its affiliation with the International." Brief at 3, 9. The Plan's express terms state in Article II Section 1(a) that a local union does not automatically become "stipulated to the Plan by virtue of its affiliation" with its International. Intervenor Exhibit 10 at 17. Instead, pursuant to the terms of the Plan, "A Union ***may become stipulated to the Plan by virtue of its affiliation*** with . . . .its International Union's affiliation with the Department" Intervenor Exhibit 10 at 17 (Article II Section 1(a)(emphasis added)). The permissive nature of a potential stipulation to the Plan, by use of the word "may," is entirely consistent with Board case law which holds that outside IBEW locals are not bound by the Plan regardless of their affiliation

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with their International. With the selection of the word "may", even the Plan admits that affiliation with an International Union that may be affiliated with the BCTD does not necessarily bind a local to the Plan's private arbitration procedures.

The single case that the Plan relies upon for the proposition that IBEW Local 876 is bound to the Plan "by virtue of its affiliation with the International" actually supports Newkirk Electric and IBEW Local 876's position that the Plan has not been agreed upon by all parties. See Brief at 10; *Int'l Union of Operating Engineers, Local 4 & Massachusetts Bldg.-Wreckers & Envtl. Remediation Ass'n, Inc. & Jdc Demolition Co., Inc. & Laborers Int'l Union of N. Am., Local 1421*, 363 NLRB No. 17 (Sept. 30, 2015). In *Massachusetts Building Wreckers*, the Board held that all parties were bound by the Plan as there was evidence that both local unions were members of the BCTD and that the employer, JDC, was bound by its contract with the Operating Engineers. The Board's finding that both local unions were members of the BCTD was critical to the holding that the parties all agreed to be bound by the Plan's dispute resolution mechanism:

> Moreover, LIUNA President Terry O'Sullivan invoked the Plan in directing Laborers' Local 1421 to cease and desist from impeding job progress by filing charges with the Board and to submit its jurisdictional dispute to the Plan. ***Both local unions' membership in the BCTD***, along with JDC's contractual obligation to utilize the Plan in its collective-bargaining agreement with one of the unions, suffice to establish that all relevant parties are bound to resolve this dispute through the Plan. Id., 363 NLRB No. 17 (Sept. 30, 2015)(emphasis added).

Moreover, in *Massachusetts Bldg.-Wreckers* , the charged union Laborers' Local 1421 did not dispute the fact that it was subject to the Plan (as the IBEW Local 876 does in the case at bar). Instead, Laborers' Local 1421 argued that "the Board is authorized to determine the merits of this jurisdictional dispute because BWA [Building Wreckers Association] is neither stipulated to the Plan nor a party to an agreement binding it or its members to the Plan, and therefore not all parties have agreed on a method for the voluntary adjustment of the dispute." Id. The Board

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ultimately held "BWA", the employer association, was not a necessary party to the jurisdictional dispute as it was not the employer. Therefore, it did not matter that BWA was not stipulated to the Plan where both local unions and the employer agreed they were stipulated. In contrast to *Massachusetts Bldg.-Wreckers*, IBEW Local 876 is not and has never been a member of the BCTD and IBEW Local 876 disputes that it is "stipulated" to the Plan.

3. The Board should not overturn longstanding and well-established Board law that recognizes that outside IBEW locals are not bound by the Building Trades' Plan.

The Plan's request that the Board overturn its long established decisional case authority finding that outside IBEW locals are not bound by the Building Trades' Plan should be denied. The Board's longstanding established holding that outside locals are not bound by the Plan is controlling. It is well settled NLRB law that IBEW Local 876, an outside local, is not subject to the Plan:

- "The International Brotherhood of Electrical Workers did participate in the December 6 arbitral hearing, but Local 196 did not. Even if the arbitrator's decision establishes that the International is bound under the Plan, it does not necessarily follow that Local 196 was so bound. Local 196 ***Business Agent Eric Patrick testified, without contradiction, that only "inside" IBEW locals are bound under the Plan, that Local 196 is an "outside" local, and that Local 196 is not affiliated with the Building and Construction Trades Department.*** The record is devoid of documentary evidence tending to show otherwise. *Int'l Bhd. of Elec. Workers, Local 196 & Aldridge Elec., Inc. & Int'l Union of Operating Engineers, Local 150*, 358 NLRB 737, 741 (2012);

- "We further find that there is no agreed-upon method for voluntary adjustment of the dispute in this case. Notwithstanding Operating Engineers' contention that the Plan binds both unions, there is no evidence in the record that the Plan applies to IBEW's claim of the work. IBEW claims the work under its outside agreement with the Employer, and that agreement, which is part of the record, makes no reference to the Plan. ***In addition, IBEW's business manager testified, without contradiction, that the Plan was not applicable to that agreement, but applied only to the inside agreement between IBEW and the Employer, which does not cover the work in dispute. In these circumstances, we find that Operating Engineers' motion to quash should be denied.***" *Int'l Bhd. of Elec. Workers Local 357 AFL-CIO & W. Diversified Elec. & Int'l Union of Operating Engineers, Local 12,* 344 NLRB 1239, 1240 (2005)(Western Diversified Electric);

- "outside locals of the IBEW are not members of the AFL-CIO Building Trades Council and do not consider themselves bound by the Disputes Board decisions." *Local 2, The Welsbach Corporation,* 218 NLRB 92 (1975);

- "The Electrical Workers local here involved must be deemed, under the terms of article 28, section 4, of the International Brotherhood of Electrical Workers Constitution, to be an "outside" local; and we have in the past recognized that such IBEW "outside" locals are not members of the AFL-CIO Building Trades Council and are not, therefore, bound by the IJDB's decisions. We therefore find that an agreed-upon method binding on all parties does not exist for the voluntary adjustment of this dispute." *Local 542, Operating Engineers*, 213 NLRB 124, 126–27 (1974);

- "Furthermore, we note that the Board has, in several decisions over the years, recognized the distinction between "inside" and "outside" locals of the IBEW and taken official note of the fact that the latter are not subject to the procedures for the resolution of jurisdictional disputes established by the Building and Construction Trades Department, AFL-CIO." Elec. Workers, Local 44, (Utility Builders) 233 NLRB 1099, 1100 (1977);

The Plan contends that the Board's prior case law is somehow "irreconcilable with the plain language of the Plan but also with federal labor policy and pre-existing Board precedent." Brief at 13. None of these contentions are true. First, the terms of the "Plan" do not override the statutory requirement in Section 10(k) that requires all parties to voluntarily agree to be bound by a private dispute mechanism. The "Plan" has been repeatedly interpreted as not applying to outside locals of the IBEW. See supra at 9-10. Even the language in the Plan, Article II, Section 1(a), supports a finding that IBEW Local 876 is not bound by the Plan. Plan Article II states that an affiliation with an International *may* bind a local to the Plan's terms. Intervenor Exhibit 10 at 17. In this case, since IBEW Local 876 is an outside local, it is not bound by the Plan – an occurrence that is supported by numerous Board decisions and which is specifically contemplated by the Plan's express terms. Despite the fact that there are numerous and consistent decisions finding that outside IBEW locals are not bound by the Plan, the Plan can cite

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to nothing in the record that contradicts the evidence that IBEW Local 876 is an outside local that is not subject to the plan. The Plan cannot cite to evidence because no such evidence exists.

Federal labor policy supports the Charging Party Newkirk and the Charged Party IBEW Local 876's position that the Plan does not apply to divest the Board of jurisdiction. As noted in the introduction, federal labor policy expressly forbids an order compelling a party to arbitrate any matter that the party did not expressly consent to arbitrate. *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648–49, 106 S. Ct. 1415, 1418, 89 L. Ed. 2d 648 (1986). The U.S. Supreme Court recognizes Congress' grant of authority to the Board to hear and determine jurisdictional disputes. "Congress, after discussion and consideration, decided to intrust this decision [hearing and determining jurisdictional disputes] to the Board. It has had long experience in hearing and disposing of similar labor problems. . . . the Board need not disclaim the power given it for lack of standards." *NLRB v. Radio & Television Broadcast Engineers Union, Local 1212,* 364 U.S. at 583. The Plan overlooks various important facts including that no agreement exists compelling IBEW Local 876 to submit the jurisdictional dispute to arbitration. "Arbitration requires a contract between the parties." *United Food & Commercial Workers Local 951, AFL-CIO & CLC v. Mulder*, 31 F.3d 365, 368 (6th Cir. 1994). The policy prohibiting a party from being compelled to submit to private arbitration a dispute that the party did not agree to submit is also found in the plain terms of the statute. 29 U.S.C.A. § 160(k). As noted above, Section 10(k) only divests the Board of jurisdiction where all the parties have agreed to submit the jurisdictional dispute to private arbitration. The Plan provides no basis for this Board to depart from its well-reasoned and applied policy.

The Plan is asking that the Board overturn its numerous decisions finding that outside IBEW locals are not subject to the Plan by relying upon a series of cases from the *Lathes* and

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Laborers that present evidentiary records that are diametrically opposed to the facts in Newkirk Electric. Brief at 11-13.

The Plan cannot cite a single case, or any record evidence, for its hypothesis that the "IBEW also bound itself and its Local Unions to the Plan, not just to resolve jurisdictional disputes involving inside local unions, but to resolve all jurisdictional disputes involving all of its affiliated Local Unions, inside and outside." Brief at 11. All Board cases that have addressed the issue as to whether outside IBEW locals are bound by the "Plan" have reached the same conclusion – that outside IBEW locals are not bound by the Plan. Unable to cite to any relevant case law involving the operating engineers, IBEW locals and the Plan, the Plan instead relies on a series of cases decided by the Board in the 1950s involving the *Lathers*. *See, e.g. Wood, Wire & Metal Lathers Local 46 (Jacobson & Co., Inc.)* and *Wood, Wire, and Metal Lathers Int'l Union (Acoustical Contractors)*, 119 NLRB 1345 (1958). In the *Lathers* cases cited by the Plan, the Board applied as precedent its prior 1955 *Lathers* decision in *A.W. Lee, Inc.* In *A.W. Lee, Inc.*, the Board concluded that all parties (including the *Lathers'* local) were bound by a private resolution procedure based upon specific language in the *Lathers' International* constitution that "reserved to itself decisional rights in jurisdictional matters" so that the *Lathers' International* "possessed authority to bind its locals to the official method for deciding jurisdictional disputes adopted by all of the International Unions of the Building and Construction Trades Department of the AFL." *Lathers Local 9 (A. W. Lee, Inc.)*, 113 NLRB 947, 952 (1955). The specific *Lathers* International constitution language is obviously not present in the IBEW constitution. The Board used its 1955 *Lathers (A.W. Lee, Inc.)* decision as precedent to reach the same conclusion in the subsequent *Jacobson & Co.* and *Acoustical Contractor* Lathers' cases. The *Lathers'* cases are instructive because the Board found that the

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Lathers' International constitution specifically bound the Lathers' locals to the private resolution procedure. The IBEW constitution does the opposite as it creates outside locals that are specifically not bound by the Plan. Charged Party Exhibit 6 (Article 26 Section 4); Tr. 420, 423, 425-426, 451-452. There is no evidence in the record that the IBEW bound IBEW Local 876 to the Plan.

The 3rd Circuit Court of Appeals enforced a Board order addressing facts very similar to those present in the instant matter. *NLRB v. Local 825 International Union of Operating Engineers,* 326 F.2d 213, 216-217 (3rd Cir. 1964). In *Local 825,* the Board rejected the Operating Engineers' claim that the jurisdictional dispute should be submitted for resolution to Joint Board for the Resolution of Jurisdictional Disputes. 326 F.2d at 216. The 3rd Circuit enforced the Board's order that denied deferral to the Joint Board and that awarded the work to the IBEW local reasoning, in part, "not only had the IBEW expressed its refusal to be bound by the Joint Board decisions of this nature, but the record indicates that it was never notified of the submission of the dispute, nor did it participate in the proceedings. Certainly, in these circumstances, it cannot be held to be bound by the decision rendered by the Joint Board." Id.

Because IBEW Local 876 is not bound to the Plan, cases requiring a "deliberate and formal withdrawal" from voluntary settlement procedures are immaterial. The Plan argues that IBEW Local 876 should be compelled to submit a "deliberate and formal withdrawal" from the Plan in order for the local not to be subject to the Plan's procedures even though the Plan can provide no evidence that IBEW Local 876 "stipulated" to the Plan's procedures in the first place. Brief at 11-13. The Plan's insistence that IBEW Local 876 must produce evidence that it "deliberately and formally withdrew" from a Plan that it was never a part of is as nonsensical as stating that Canada should "deliberately and formally withdraw" from the United States of

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America before it elects its prime minister. In *Laborers Local 423 (V&C Brickcleaning Co.),* 203 NLRB 1015(1973) the Board had before it a "narrow" issue:

> "whether a union, having agreed with the other necessary parties to be bound to the National Joint Board for the Settlement of Jurisdictional Disputes, can by the simple act of refusing to comply with an award of that board terminate its obligation to submit jurisdictional disputes to that board and thereby eliminate what had previously been an "agreed-upon" method for the voluntary settlement of such disputes within the meaning of Section 10(k) of the Act."

The Board answered this question in the negative. *Laborers, Local 423*, 203 NLRB 1015 (1973). This "narrow" issue is not present in the case at a bar as IBEW Local 876 never "agreed" to be bound to the Plan. *Laborers Local 383 (Industrial Turf, Inc.),* 218 NLRB 424, 427 relied upon the 1973 *Laborers V&C Bricklaying Co.* Board decision. In *Industrial Turf, Inc.* the Board held that because the parties had previously agreed to be bound by the joint board's resolution procedure, the Board would not accept the alleged "private agreement" between the two unions not to be bound by the procedure "for a period from August 1973 until August 1974." Id. At 427. The Board found that there was no evidence that the two unions withdrew from the BCTD or have formally notified the IJDB that they will not submit to the authority of that forum for the resolution of their jurisdictional disputes. Id at 427. As IBEW Local 876 is not relying on a "private agreement", since IBEW Local 876 never "agreed" to be subject to the Plan and as the Board has already validated the fact that "outside" IBEW locals are not subject to the Plan, the application of the *Laborers* cases to the pending Newkirk Electric matter require that the Board exercise jurisdiction to render a decision on the merits.[3]

The Plan appears to be summing the record evidence of a different case when it reaches its four conclusions. Brief at 14. Even if the Board accepts that the IBEW is affiliated with the

[3] The *Sheet Metal Wokers Local 1*, 114 NLRB 924, 930 likewise does not support the Plan's attempt to bind IBEW Local 876 to the private procedure. The Board recognized in the case that all parties had agreed to be bound and that a union's comment that it would not abide by the plan's determination does not mean that a voluntary procedure to resolve disputes does not exist.

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BCTD, there is no evidence that the "BCTD has negotiated the Plan on behalf of its affiliates (e.g. the IBEW) and their affiliated Local Unions (e.g. Local 876)." Brief at 14. The Plan cites to nothing in the record for this astonishing conclusion. Indeed, the record evidence establishes that IBEW Local 876 is not a member of the BCTD, that the contract between IBEW Local 876 and Newkirk Electric does not reference the Plan, that IBEW Local 876 is an outside local, and that pursuant to the International Constitution and established Board case law outside locals like the IBEW Local 876 are not "stipulated" to the Plan. That the Plan claims that it "requires all jurisdictional disputes between affiliates and their affiliated local unions" be submitted to the Plan does not bind a party, like IBEW Local 876, to the Plan's dispute resolution procedures. As federal labor law recognizes, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. Moreover, the plain terms of the plan provide that it is not mandated that a local union is "stipulated to the plan by virtue of its affiliation" with its International. ("A union *may* become stipulated to the Plan by virtue of its affiliation with . . . its . . . International" Intervenor Exhibit 10 at 17). Regardless of its affiliation with the IBEW, IBEW Local 876 has not "become stipulated to the Plan" and nothing in the Plan document (Intervenor Exhibit 10) eliminates the local's right to be free from terms that it did not negotiate, review or agree to be bound by.

4. The Plan's failure to provide notice and to comply with its own procedures constitute additional grounds to reject the Plan's assertion of jurisdiction over the Section 10(k) case.

IBEW Local 876 will address each of the arguments raised in the Plan's Section "C" in order.

First, the fact that the collective bargaining agreement between the IBEW Local 876 and Newkirk does not reference the Plan is relevant in demonstrating that the Plan's procedures have

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no hold on the local. The Board will look to collective bargaining agreements and whether the parties have agreed to terms in the agreements relating to the resolution of jurisdictional disputes. "Finally, the collective-bargaining agreement between the Employer and Local 196 does not support a finding that Local 196 was bound by the Plan because it makes no reference to the Plan.In these circumstances, we find that Local 150 has not established that Local 196 is bound under the Plan." *Int'l Bhd. of Elec. Workers, Local 196 & Aldridge Elec., Inc. & Int'l Union of Operating Engineers, Local 150*, 358 NLRB 737, 740 (2012). See also, *Int'l Union of Operating Engineers*, 322 NLRB 709, 712 (1996)(finding that no agreed-on method exists for voluntarily resolving the dispute in a definitive manner after reviewing parties respective collective bargaining agreements). The lack of any reference to the Plan in the collective bargaining agreement between IBEW Local 876 and Newkirk is a factor to consider in rejecting the Plan's claim to bind the local. IBEW Local 876 is not "bound" to the Plan "by virtue" of its affiliation with the International for all the reasons set forth previously in this brief. Moreover, *Iron Workers Local 380 (Skoog Constr.Co.)*, 204 NLRB 353, 354 (1973) does not in any way provide support for the "bind by virtue" argument. In *Skoog Constr. Co.*, the Board held that the Carpenters Union was bound by a voluntary dispute measure where the record evidence demonstrated that all parties "agreed to be bound by the Joint Board" and because the Carpenters Union was formally affiliated with the Building Trades. Id. No argument was raised in *Skoog* that the carpenters local was not bound by the joint board; similarly, no argument was raised regarding any provisions of the Carpenter's international constitution.

Second, the Plan attempts to excuse its failure to provide notice to IBEW Local 876 about its decision to initiate and conduct an arbitration hearing by stating that "notice of the proceeding was provided to Local 876's parent union." Brief at 15. There is no dispute that no notice was

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provided to IBEW Local 876. Tr. 456-457, 466; Intervenor Exhibits 16, 19. An alleged notice to the IBEW does not satisfy a requirement to provide notice to IBEW Local 876. This Board has rejected alleged voluntary dispute resolution proceedings where the arbitrator/plan fails to comply with basic notions of due process like providing notice. "We also conclude that the Joint Board award was not an effective voluntary adjustment of the dispute, within the meaning of Section 10(k), since all the parties did not participate in the proceeding, did not join in the submission to the Joint Board, and did not agree to be bound by the decision." *Elec. Workers, Ibew, Local 497 (Kemper Constr. Co.),* 191 NLRB 145, 147 (1971).

Third, the failure to offer into evidence the documents entered into the "Plan" arbitration renders further meaningless the arbitrator's finding relating to Plan jurisdiction. "Furthermore, the documents on which the arbitrator based his decision were not put into evidence in this proceeding. Without those documents, the Board will not broadly interpret the arbitrator's statement to mean that Local 196 bound itself to the Plan." *Int'l Bhd. of Elec. Workers, Local 196 (Aldridge Electric)*, 358 NLRB 737, 740 (2012).

Fourth, the Plan's arbitration was defective as it did not comply with its own procedures. The Plan explicitly provides that:

> "The Arbitrator, with the assistance of the Administrator, **shall notify** the employer, **local union(s)** and the appropriate National or International Union(s) . . .by facsimile or other electronic means of the place and time he has chosen for this hearing." Intervenor Exhibit 10 at 28 (emphasis added).

This required notice was never provided to IBEW Local 876.

5. The Board should deny the Plan's Motion to File an Amicus Brief

The Board should exercise its discretion and deny the Plan's Motion to File an Amicus Brief. The Board conducted an evidentiary hearing on this case on October 13, 14 and 20, 2016 pursuant to Section 10(k) of the National Labor Relations Act, 29 U.S.C. § 160(k). Local 324,

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International Union of Operating Engineers, appeared as an intervening labor union. Newkirk Electric Associates appeared as the Employer and IBEW Local 876 appeared as the charged party, labor organization. The Plan did not attempt to intervene at an earlier date and its brief does not offer any useful additional argument that the parties have not already addressed in their post-hearing briefs.

The Plan's Brief impermissibly attempts to add "evidence" to the record well after the hearing in this case has closed. Portions of the Plan's brief are devoid of any citation to the record. For instance, see Brief at 2-3 where the Plan describes that the current Plan has been in effect since 1984, that the Plan has five employer associations, and the alleged composition of the JAC and vice-chairman. The Plan later asserts that "record evidence clearly establishes that the BCTD has negotiated the Plan on behalf of its affiliates (e.g., the IBEW) and their affiliated Local Unions (e.g. Local 876)." Brief at 14. The Plan cites to no portion in the record that would "establish" this point because no such record evidence exists. Not only did no BCTD representative testify, but there was no evidence of any "negotiation."

CONCLUSION

For all the foregoing reasons, the charged party IBEW Local 876 respectfully requests that this Board exercise its jurisdiction and hear and determine that the longstanding assignment of disputed work to the Newkirk Electric Associates, Inc. employees represented by IBEW Local 876 is proper.

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Date: December 21, 2016

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARDS
REGION 7

NLRB Case No. 07-CD-182456

LOCAL 876 INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS (IBEW), AFL-CIO

Charged Party/Respondent

and

NEWKIRK ELECTRIC ASSOCIATES, INC.

Charging Party/Employer

and

LOCAL 324, INTERNATIONAL UNION OF
OPERATING ENGINEERS, AFL-CIO

Involved Party/Intervenor

Certificate of Service

The undersigned certifies that he has served a copy of the Response to Amicus Curiae Plan for the Settlement of Jurisdictional Dispute in the Construction Industry upon counsels for Charging Party and Involved Party via email on December 21, 2016, as follows:

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